STATE OF MICHIGAN

COURT OF APPEALS

PEOPLE OF THE STATE OF MICHIGAN, Plaintiff-Appellee,	UNPUBLISHED April 10, 2012
v	No. 299654 Wayne Circuit Court
CONRAD ROBERT SCHULTZ, Defendant-Appellant.	LC No. 09-018124-FC

Before: WILDER, P.J., and O'CONNELL and WHITBECK, JJ.

PER CURIAM.

Following a jury trial, defendant was convicted of four counts of first-degree criminal sexual conduct (CSC), MCL 750.520b(1)(a) and (b), and three counts of second-degree CSC, MCL 750.520c(1)(a) and (b). He appeals by right. We affirm.

Defendant's convictions arose out of allegations that he sexually abused his adopted son over a period of approximately five years. The complainant testified that the abuse began when he was in the fourth or fifth grade. Defendant's first trial on the charges ended in a mistrial.

I. DISCOVERY

Defendant first argues that the trial court erred in denying his discovery request for production of the prosecutor's notes of interviews with the complainant and the complainant's brother. The trial court agreed with the prosecutor that the interview notes were protected work product and were not subject to discovery. We agree.

"A trial court's decision regarding discovery is reviewed for abuse of discretion." *People v Phillips*, 468 Mich 583, 587; 663 NW2d 463 (2003). Similarly, we review for abuse of discretion a trial court's decision concerning whether to review materials *in camera*. *People v Laws*, 218 Mich App 447, 454-455; 554 NW2d 586 (1996). In criminal matters, discovery is limited to those items expressly set forth in MCR 6.201. The subject of the discovery must be set forth in that rule or the party seeking discovery must show good cause why the trial court should order the requested discovery. *People v Greenfield (On Reconsideration)*, 271 Mich App 442, 447-448; 722 NW2d 254 (2006). Unless MCR 6.201 requires production of information or the party seeking discovery demonstrates good cause, the trial court is without authority to mandate discovery. *Id*. at 448-449.

MCR 6.201(A)(2) requires the prosecution to disclose upon request "any written or recorded statement, including electronically recorded statements, pertaining to the case by a lay witness whom the party may call at trial[.]" In *People v Holtzman*, 234 Mich App 166; 593 NW2d 617 (1999), this Court addressed whether the disclosure requirement in MCR 6.201(A)(2) requires release of an attorney's notes of interviews with witnesses whom the attorney intends to call at trial, or whether the term "statement" is limited to a formal narrative account signed, written, or adopted by the witness. After reviewing various rules and policies that were implicated, this Court looked to the definition of "statement" in MCR 2.302(B)(3)(c), which provides:

> For purposes of subrule (B)(3)(b), a statement previously made is
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> (*i*) a written statement signed or otherwise adopted or approved by the person making it; or
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> (*ii*) a stenographic, mechanical, electrical, or other recording, or a transcription of it, which is a substantially verbatim recital of an oral statement by the person making it and contemporaneously recorded.

This Court held that "[o]n the basis of this definition, notes of an interview, except in the rare occasion where they would come within the purview of this definition, do not constitute a 'statement' and are not subject to mandatory disclosure by either the prosecution or the defense." *Holtzman*, 234 Mich App at 169. This Court explained that mandatory disclosure of witness interview notes that do not meet the narrow definition of "statement" under MCR 2.302 would run afoul of "deeply ingrained ethical and privilege rules" because disclosure of an attorney's notes would subject the attorney to being called as a witness and would also compromise protected work product under MCR 2.302(B)(3). *Id.* This Court also observed that "[t]he goals of criminal discovery for both defense and prosecution are already well served by existing law and procedural rules." *Id.* at 170. Under *Holtzman*, the prosecutor's witness interview notes were not subject to discovery.

Defendant contends that the prosecutor's notes should be discoverable because the interviews were conducted before charges were filed, and therefore, the interviews should be deemed to have been conducted for investigative purposes. We disagree. The timing and nature of the interviews does not change the character of the prosecutor's notes. The fact that charges had not yet been filed when the prosecutor interviewed the witnesses did not preclude the notes from being considered protected work product. See *People v Gilmore*, 222 Mich App 442, 455; 564 NW2d 158 (1997).

Defendant argues that the trial court should have at least conducted an *in camera* review of the notes to determine whether they could be considered a statement under MCR 2.302(B)(3)(c). However, the prosecutor explained that he was the only person who had reviewed his notes of the witness interviews. Defense counsel never provided any reason to believe that either child had ever signed or otherwise approved any writing prepared by the prosecutor during or after the interviews. Thus, the trial court was within its discretion to conclude defendant had not demonstrated a reasonable probability that the notes qualified as a statement to justify an *in camera* inspection. See MCR 6.201(C)(2).

We also reject defendant's argument that he had a due process right to discovery of the prosecutor's witness interview notes under *Brady v Maryland*, 373 US 83; 83 S Ct 1194; 10 L Ed 2d 215 (1963), or that the prosecutor was obligated to disclose the notes under MRPC 3.8(d).

> In order to establish a *Brady* violation, a defendant must prove: (1) that the state possessed evidence favorable to the defendant; (2) that he did not possess the evidence nor could he have obtained it himself with any reasonable diligence; (3) that the prosecution suppressed the favorable evidence; and (4) that had the evidence been disclosed to the defense, a reasonable probability exists that the outcome of the proceedings would have been different. [*People v Lester*, 232 Mich App 262, 281; 591 NW2d 267 (1998).]

This duty of disclosure under *Brady* extends to impeachment evidence and any information that would affect the credibility of the prosecution's witnesses. *Id.* at 281.

MRPC 3.8(d) similarly provides, in pertinent part:

> The prosecutor in a criminal case shall:
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> * * *
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> (d) make timely disclosure to the defense of all evidence or information known to the prosecutor that tends to negate the guilt of the accused or mitigates the degree of the offense, and, in connection with sentencing, disclose to the defense and the tribunal all unprivileged mitigating information known to the prosecutor, except when the prosecutor is relieved of this responsibility by a protective order of the tribunal; . . .

In this case, this is no basis for concluding that the prosecutor's interview notes were subject to disclosure under MRPC 3.8(d) or *Brady*. As indicated previously, defendant did not provide any basis for believing that the notes contained any statements adopted or approved by the witnesses. Accordingly, there was no basis for believing that the notes had any exculpatory or impeachment value.

Lastly, there is no merit to defendant's argument that disclosure of the prosecutor's witness notes was necessary to protect defendant's constitutional right of confrontation. Defendant was afforded the opportunity to confront both the complainant and his brother at trial, so his right of confrontation was not violated.

For these reasons, the trial court did not abuse its discretion in denying defendant's request for discovery of the prosecutor's witness interview notes, or in failing to conduct an *in camera* review of the notes.

II. LIMITATIONS ON CROSS-EXAMINATION OF THE COMPLAINANT

Defendant next argues that the trial court abused its discretion by precluding him from cross-examining the complainant about specific instances of conduct involving the complainant's dishonesty. Defendant further argues that the trial court's limitations on cross-examination

violated his constitutional right of confrontation. Although defendant preserved his evidentiary argument by raising the issue below, he did not argue that the proffered line of questioning was necessary to protect his rights under the Confrontation Clause, leaving that issue unpreserved. We review the trial court's evidentiary rulings for an abuse of discretion. *People v Washington*, 468 Mich 667, 670-671; 664 NW2d 203 (2003). Defendant's unpreserved constitutional claim is reviewed for plain error affecting defendant's substantial rights. *People v Walker (On Remand)*, 273 Mich App 56, 65-66; 728 NW2d 902 (2006).

MRE 608(b) provides:

> **Specific Instances of Conduct**. Specific instances of the conduct of a witness, for the purpose of attacking or supporting the witness' credibility, other than conviction of crime as provided in Rule 609, may not be proved by extrinsic evidence. They may, however, in the discretion of the court, if probative of truthfulness or untruthfulness, be inquired into on cross-examination of the witness (1) concerning the witness' character for truthfulness or untruthfulness, or (2) concerning the character for truthfulness or untruthfulness of another witness as to which character the witness being cross-examined has testified.

Thus, the trial court had discretion to permit defense counsel to inquire into specific instances of the complainant's conduct on cross-examination to the extent the matters were probative of the complainant's truthfulness or untruthfulness.

We discern no abuse of discretion in the trial court's decision to limit cross-examination concerning specific instances of the complainant's conduct. The court precluded defendant from cross-examining the complainant about whether he signed his parents' name to a school document, changed a school grade, and whether he lied about completing his homework. As the trial court observed, these matters all related to the complainant's character for untruthfulness about his own conduct. The precluded inquiry did not involve the complainant's character for untruthfulness concerning the conduct of another person. The trial court permitted defense counsel to elicit the complainant's admission that he had been punished for lying and for falsely accusing his brother of doing things he had not done. The complainant's mother acknowledged that the complainant was known to lie. The court also allowed defendant to call a defense witness to testify that she was familiar with the complainant from his involvement with the Cub Scouts, and that the complainant had a reputation in the scouting community for being untruthful. The limitations on other testimony imposed by the trial court were a proper exercise of the trial court's discretion.

Defendant also argues that the trial court's ruling deprived him of his right to confront his accuser. Both the federal and state constitutions afford an accused the right to confront the witnesses against him. US Const, Am VI; Const 1963, art 1, § 20. The Confrontation Clause is violated when limitations are placed on a defendant's ability to cross-examine a witness to bring out facts from which bias, prejudice, or lack of credibility may be inferred. *People v Cunningham*, 215 Mich App 652, 657; 546 NW2d 715 (1996). However, the Confrontation Clause does not prohibit a court from imposing limits on cross-examination. See *People v Ho*, 231 Mich App 178, 189-190; 585 NW2d 357 (1998). It protects the defendant's right for a *reasonable* opportunity to test the truthfulness of a witness's testimony. *Id.*

Because defendant was afforded a reasonable opportunity to cross-examine the complainant concerning his untruthfulness, there was no plain constitutional error. Further, because defendant was permitted to elicit other evidence that the complainant was known to lie and had a reputation for untruthfulness in the scouting community, the limitations imposed by the trial court did not affect defendant's substantial rights.

III. THE TRIAL COURT'S COMMENTS AND INSTRUCTIONS

Defendant next argues that the trial court pierced the veil of judicial impartiality when it instructed the jury that consent was not a defense to the charged conduct and when it offered a characterization of the complainant's prior testimony when responding to an objection. We disagree.

We review the record de novo to assess the trial court's conduct for impartiality. See *In re Hocking*, 451 Mich 1, 5 n 8; 546 NW2d 234 (1996). MCL 768.29 vests in the trial court the authority and obligation to instruct the jury on the applicable law and to use its discretionary authority to comment on the evidence as justice requires. See *People v Anstey*, 476 Mich 436, 452; 719 NW2d 579 (2006). However, any comments by the court must be fair and impartial; the court may not let the jury know its own views regarding disputed factual issues. *Id.* at 453. "The appropriate test to determine whether the trial court's comments or conduct pierced the veil of judicial impartiality is whether the trial court's conduct or comments were of such a nature as to unduly influence the jury and thereby deprive the appellant of his right to a fair and impartial trial." *People v Conley*, 270 Mich App 301, 307-308; 715 NW2d 377 (2006) (citations and internal quotations omitted).]

During cross-examination, defense counsel asked the complainant if he was "excited" or "erect" when he placed his penis in defendant's mouth. The trial court sustained the prosecutor's objection. After defense counsel concluded his cross-examination, the trial court instructed the jury that "consent to any sexual contact is not an issue in this case. By law, a child under the age of 16 years old cannot consent to sexual contact." The court gave a similar instruction during its final jury instructions.

Defendant does not challenge the trial court's limitation on his cross-examination of the complainant, but instead argues that the trial court's consent instructions improperly undermined the cross-examination. We disagree. The trial court accurately instructed the jury that any suggestion in the testimony that the complainant may have consented to the alleged sexual activity was not legally relevant. The court's instructions did not suggest that the court had a view concerning the credibility of the complainant's testimony, nor did the court convey an opinion one way or the other that any testimony that the complainant may have been erect or excited rendered his account of the offenses more or less credible. Thus, the trial court's instructions did not pierce the veil of judicial impartiality.

Defendant also argues that the trial court inaccurately characterized the complainant's testimony when responding to the prosecutor's objection to testimony concerning whether the complainant was comfortable talking about sex. Defense counsel argued that the testimony was relevant for impeachment because the complainant had previously testified that he was uncomfortable talking about sexual things. In sustaining the prosecutor's objection, the trial

court commented that the complainant had only testified that he was uncomfortable discussing sexual matters "in a courtroom full of people." The record does not support defendant's argument that the trial court mischaracterized the complainant's prior testimony.

IV. AMENDMENT OF THE INFORMATION

Defendant lastly argues that the trial court abused its discretion by allowing the prosecution to amend the information after the close of proofs to specify a narrower time frame for the offenses charged in counts two and six of the information. We disagree.

"A trial court may permit amendment of the information at any time to correct a variance between the information and the proofs, unless doing so would unfairly surprise or prejudice the defendant." *People v Unger*, 278 Mich App 210, 221; 749 NW2d 272 (2008). We review a trial court's decision to grant a motion to amend the information for an abuse of discretion. *Id*.

The original information charged defendant generally with committing several offenses between January 2004 and February 2009. However, counts two and six in the information stated that defendant was subject to the enhanced penalties prescribed in MCL 750.520b(2)(b) and MCL 750.520c(2)(b), as amended by 2006 PA 171, effective August 28, 2006. Indeed, at defendant's preliminary examination, the court allowed the proofs to be reopened to establish that two of the offenses were committed after August 28, 2006, thereby subjecting defendant to the enhanced penalties in the amended statutes. Although defendant was clearly on notice as early as the preliminary examination that the prosecution intended to prove that some of the offenses were committed after the effective date of the statutory amendments, thereby subjecting defendant to the enhanced penalties under the amended statutes, and although counts two and six of the original information expressly referred to those enhanced penalties, the information continued to reflect a general time frame of January 2004 to February 2009 for the date of the offenses. The amendment after the close of proofs at trial modified the time frame for counts two and six by specifying that those offenses were alleged to have been committed between September 2006 and January 21, 2007.

The amendment did not unfairly surprise defendant because he was on notice as early as the preliminary examination and from the sentencing allegations in counts two and six of the original information, that it was the prosecution's theory that two of the offenses were committed after the effective date of the statutory amendments in MCL 750.520b(2) and MCL 750.520c(2). Further, defendant was not prejudiced because the amendment did not enlarge the time frame for the offenses charged in the original information, but merely narrowed the time frame for the offenses charged in counts two and six. Further, the defense theory at trial was that defendant did not commit any of the offenses, not that he did not commit a particular offense within a specified time period. Because defendant failed to show that he was unfairly surprised or would be prejudiced by the amendment, the trial court did not abuse its discretion in granting the prosecution's motion to amend.

Affirmed.

/s/ Kurtis T. Wilder
/s/ Peter D. O'Connell
/s/ William C. Whitbeck